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No. 99-1393

In the Supreme Court of the United States

MARIA F. GOODSON AND ALEXANDROS F. GOODSON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether video poker licenses issued by the State of Louisiana constitute "property" within the meaning of the mail fraud statute, 18 U.S.C. 1341.

2. Whether petitioner Maria Goodson had fair notice that her misrepresentations on applications for video poker licenses could constitute a violation of the mail fraud statute.

3. Whether the district court committed plain error in failing to instruct the jury on the materiality element of a mail-fraud offense.

4. Whether the court of appeals applied an incorrect standard in rejecting petitioner Maria Goodson's claim that the evidence was insufficient to support her mail fraud conviction.

5. Whether the district court correctly ordered the forfeiture of two companies in connection with the RICO convictions of co-defendants Carl Cleveland and Fred Goodson despite petitioners' claim that they were the true owners of the companies.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-44a) is reported at 182 F.3d 296. The opinion of the district court holding that unissued video poker licenses are "property" within the meaning of the mail fraud statute (Pet. App. 50a-84a) is reported at 951 F. Supp. 1249. The orders of the district court denying petitioner Maria Goodson's motion for judgment of acquittal (Pet. App. 85a-166a) and both petitioners' third-party claims to forfeited property (Pet. App. 167a-174a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1999. The petitions for rehearing were denied on September 22, 1999 (Pet. App. 45a-49a). The petition for a writ of certiorari was filed on December 21,

1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Louisiana, petitioner Maria Goodson was convicted on one count of mail fraud, in violation of 18 U.S.C. 1341. She was sentenced to six months' imprisonment, to be followed by six months' home detention. The district court then ordered the forfeiture of two co-defendants' ownership interests in two companies, rejecting both petitioners' claims that they were the true owners of those companies. The court of appeals affirmed Maria Goodson's conviction and the judgment of forfeiture. Pet. App. 1a-44a.

1. Petitioners are the adult children of Fred Goodson. In 1992, Fred Goodson and his family formed Truck Stop Gaming, Ltd. (TSG, Ltd.), and its corporate partner, Truck Stop Gaming, Inc. (TSG, Inc.), in order to participate in the video poker business at their truck stop in Slidell, Louisiana. With the assistance of attorney Carl Cleveland, the Goodsons prepared applications for a gaming license for TSG, Ltd., and submitted the applications to the licensing authority, the Louisiana State Police. The application requires a partnership seeking a gaming license to identify its partners, to submit personal financial statements for all partners, to affirm that the listed partners are the sole beneficial owners, and to affirm that no partner has an arrangement to hold his interest as "an agent, nominee or otherwise," or a present intention to transfer any interest in the partnership at a future time. Pet. App. 2a-3a.

The initial application submitted on behalf of TSG, Ltd., identified petitioners as the limited partners and

TSG, Inc., as the general partner. The application listed no other persons or entities as having any ownership interest in TSG, Ltd. TSG, Ltd., submitted renewal applications in 1993, 1994, and 1995 that likewise listed no additional ownership interests. In fact, the true owners of TSG, Ltd., at all times were Fred Goodson and Carl Cleveland, who concealed their ownership interest from state regulators to avoid an inquiry into their suitability as licensees. Pet. App. 3a-4a, 5a-6a.

In 1994, Maria Goodson executed a "Sale of Partnership Interest and Pledge Agreement," which conveyed a 4.99% interest in TSG, Ltd., to Benny Rayburn, the adult son of Louisiana State Senator Benjamin Rayburn. The younger Rayburn's interest was not disclosed in TSG, Ltd.'s 1995 license renewal application. Pet. App. 4a n.4, 5a.

2. In 1996, a federal grand jury indicted Maria Goodson, Fred Goodson, Cleveland, then-former State Senator Rayburn, and others on multiple counts of mail fraud, racketeering, and various other offenses.[1] The indictment alleged, among other things, that the defendants committed mail fraud, in violation of 18 U.S.C. 1341, by obtaining a video poker license for TSG, Ltd., in 1992, and renewing the license in 1993, 1994, and 1995, by fraudulently concealing that Fred Goodson and Cleveland were the true owners of TSG, Ltd. Pet. App. 5a.

a. Before trial, various defendants, including Maria Goodson, moved to dismiss the mail fraud counts on the ground that state licenses to operate video poker sites do not constitute "property" within the meaning of

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[1] Petitioner Alexandros Goodson was identified as an unindicted co-conspirator. Pet. App. 5a n.5.

Section 1341, which makes it a crime to use the mails in connection with "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1341. They contended that a scheme to acquire a state gaming license through false representations does not implicate any property interest of the State, arguing that such licenses have no value to the State and, consequently, do not become property until they are issued by the State to a private party.

The district court denied the motion. Pet. App. 71a-84a. The court concluded that "licenses constitute property even before they are issued," agreeing with the position of the First Circuit and the Third Circuit on that question. *Id.* at 79a; see also *id.* at 75a-77a (citing *United States* v. *Bucuvalas*, 970 F.2d 937 (1st Cir. 1992), cert. denied, 507 U.S. 959 (1993), and *United States* v. *Martinez*, 905 F.2d 709 (3d Cir.), cert. denied, 498 U.S. 1017 (1990)). The court distinguished cases involving other sorts of licenses, such as taxi licenses, in which a government was held to have only a regulatory interest, and not a property interest. The court reasoned that the State of Louisiana clearly has a property interest in video poker licenses, because the State "receives a significant percentage of revenue" from the licenses and "continues to exercise a great deal of control" over them. Pet. App. 81a.

b. The jury found Maria Goodson guilty on Count 6 of the indictment, which charged mail fraud in connection with the 1995 video poker license renewal application for TSG, Ltd. The district court denied Maria Goodson's post-verdict motion for a judgment of acquittal on that count. Pet. App. 89a-91a. The court explained that the indictment charged Maria Goodson with failure to disclose both (i) the ownership interest

in TSG, Ltd., that Fred Goodson and Cleveland possessed from the outset, and (ii) the ownership interest in TSG, Ltd., that Benny Rayburn acquired in 1994. The court concluded that "the jury could have found Maria Goodson guilty beyond a reasonable doubt of Count 6 on either or both theories." *Id.* at 91a.

c. The same jury found Fred Goodson and Cleveland guilty of violations of the Racketeer Influenced and Corrupt Organization Act (RICO), 18 U.S.C. 1961 *et seq.* The district court, at the government's request, ordered the forfeiture of the two men's interests in TSG, Ltd., and TSG, Inc. See 18 U.S.C. 1963(a) (describing money and property that is subject to forfeiture under RICO).

Petitioners filed petitions of intervention in the forfeiture proceedings, pursuant to 18 U.S.C. 1963(*l*)(2), asserting that they were the record owners of TSG, Ltd., and TSG, Inc. After an evidentiary hearing, the district court denied petitioners' claims. The court found that Fred Goodson and Cleveland were the "true owners" of the companies and that their ownership interests had been properly forfeited to the government. Pet. App. 174a.

3. The court of appeals affirmed Maria Goodson's conviction and sentence and the judgment of forfeiture. Pet. App. 1a-44a.

a. The court of appeals rejected Maria Goodson's contention that a video poker license does not constitute property for purposes of the mail fraud statute. Pet. App. 19a. The court relied on its recent opinion in *United States* v. *Salvatore*, 110 F.3d 1131, 1139-1143 (5th Cir.), cert. denied, 522 U.S. 981 (1997), which held that Louisiana had a property interest in an unissued video poker license.

b. The court of appeals next rejected Maria Goodson's contention that she lacked fair notice that her conduct constituted a crime. Pet. App. 19a-21a. The court noted that, at the time of Maria Goodson's offense, "at least two circuits" had held that unissued licenses are property for mail fraud purposes. *Id.* at 20a. The court concluded that these decisions afforded Maria Goodson "reasonable opportunity to know that [her] conduct could be proscribed by the mail fraud statute." *Ibid.*

c. The court of appeals further held that the evidence was sufficient to support Maria Goodson's conviction. Pet. App. 32a-33a. The court explained that, "[b]ecause the jury need only have found Maria Goodson guilty beyond a reasonable doubt on one of the two potential schemes underlying her mail fraud conviction," the court would consider the evidence relating to only one of those schemes, the scheme to conceal Benny Rayburn's ownership interest in TSG, Ltd. *Id.* at 32a. The court found that Maria Goodson's participation in that scheme was adequately established by evidence (i) that she transferred a 4.99% ownership interest in TSG, Ltd., to Benny Rayburn in 1994, (ii) that the transfer was not reported in TSG, Ltd.'s 1995 license renewal application, and (iii) that she was aware of the transfer of ownership to Benny Rayburn. *Id.* at 32a-33a.

d. The court of appeals affirmed the forfeiture of the interests of Fred Goodson and Cleveland in TSG, Ltd., and TSG, Inc. Pet. App. 40a-44a. The court rejected petitioners' contention that the forfeiture was erroneous because they were listed as the record owners of those companies in the Agreement of Partnership that they filed with the Louisiana Secretary of State. The court declined to give weight to the "obviously false partnership agreement," explaining that petitioners

were "straw people used in the sham to hide the true ownership of [the companies]." *Id.* at 42a.

e. After oral argument on petitioners' appeal, Maria Goodson sought leave to file a supplemental brief based on this Court's intervening decision in *Neder* v. *United States*, 527 U.S. 1, 20-25 (1999), which held that the materiality of the falsehoods made in a scheme to defraud is an element of a mail fraud offense. She argued that the district court committed plain error in failing to give a materiality instruction. The government opposed the motion. The government argued that the issue had been waived and, in any event, that the district court had included materiality language in the jury charge and the defendants had argued materiality to the jury. The court of appeals denied the motion to file a supplemental brief and did not address the issue in its opinion.

DISCUSSION

1. Maria Goodson contends (Pet. 16-19) that unissued video poker licenses in the hands of the State do not constitute "property" within the meaning of the federal mail fraud statute, 18 U.S.C. 1341. This Court has granted the petition for a writ of certiorari of her co-defendant Carl Cleveland on the identical issue. *Cleveland* v. *United States*, 120 S. Ct. 1416 (2000) (No. 99-804). Accordingly, the Court should hold this petition pending the decision in *Cleveland* and dispose of the petition as appropriate in light of that decision.

2. Maria Goodson next contends (Pet. 19-20) that she lacked fair notice that 18 U.S.C. 1341 proscribes the conduct for which she was convicted. She notes that the Fifth Circuit had not yet decided at the time of her offense, as it did subsequently in *United States* v. *Salvatore*, 110 F.3d 1131, cert. denied, 522 U.S. 981

(1997), that unissued video poker licenses constitute "property" for purposes of the mail fraud statute, and that the other courts of appeals that had addressed the general question of whether unissued licenses constitute "property" were in conflict.

There is no due process bar to applying the holding in *Salvatore* to Maria Goodson. Due process bars retroactive application of a judicial construction of a law only if the construction was not reasonably foreseeable. See *United States* v. *Rodgers*, 466 U.S. 475, 484 (1984); *Brown* v. *Ohio*, 432 U.S. 161, 169 n.8 (1977). This Court has held that a judicial construction of a statute is reasonably foreseeable when some circuits have adopted it, even if others have rejected it. *Rodgers*, 466 U.S. at 484; cf. *United States* v. *Lanier*, 520 U.S. 259, 266 (1997) ("[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor *any* prior judicial decision has fairly disclosed to be within its scope.") (emphasis added). Here, at the time that Maria Goodson committed her offense, several circuits had held that an unissued license may constitute "property" for purposes of the mail fraud statute. See *United States* v. *Bucuvalas*, 970 F.2d 937, 944 (1st Cir. 1992), cert. denied, 507 U.S. 959 (1993); *Borre* v. *United States*, 940 F.2d 215, 222 (7th Cir. 1991); *United States* v. *Martinez*, 905 F.2d 709, 715 (3d Cir.), cert. denied, 498 U.S. 1017 (1990); *United States* v. *Italiano*, 894 F.2d 1280, 1285 n.6 (11th Cir.), cert. denied, 498 U.S. 896 (1990). Those decisions were sufficient to make it reasonably foreseeable to Maria Goodson that the Fifth Circuit might conclude that the submission to the State of fraudulent applications to acquire or renew a video poker license would be held to involve "property" within the meaning of the mail fraud statute.

Maria Goodson's reliance on *Lanier*, *supra*, and *Wilson* v. *Layne*, 526 U.S. 603 (1999), is misplaced. Neither case concerned whether due process barred the retroactive application to a defendant of a judicial construction of a criminal statute that had been adopted by several courts of appeals by the time that the defendant violated the statute. Those cases instead concerned whether a constitutional right was "clearly established" at the time at issue, so that a government actor who violated that right could be held liable criminally (under 18 U.S.C. 242 (1994 & Supp. IV 1998)) or civilly (under 42 U.S.C. 1983 (1994 & Supp. III 1997) or *Bivens* v. *Six Unknown Named Agents*, 403 U.S. 388 (1971)). See *Wilson*, 526 U.S. at 614-618; *Lanier*, 520 U.S. at 264-272.

3. Relying on *Neder* v. *United States*, 527 U.S. 1 (1999), Maria Goodson contends (Pet. 21-22) that the district court committed plain error in failing to instruct the jury that a falsehood charged in a mail fraud count must be material.[2]

The court of appeals correctly declined to address that claim, which Maria Goodson and her co-defendants sought to raise for the first time in a supplemental brief. It is well-settled that a defendant waives appellate consideration of an issue raised for the first time in a reply brief or later supplemental brief. See, *e.g.*, *Dunham* v. *Kisak*, 192 F.3d 1104, 1110 (7th Cir. 1999); *United States* v. *Universal Mgmt. Servs., Inc.*, 191 F.3d

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[2] As Maria Goodson notes (Pet. 18), the same issue has been raised in the petitions for a writ of certiorari filed by co-defendants Cleveland (No. 99-804) and Fred Goodson (No. 99-939). The Court, while granting a writ of certiorari in No. 99-804 on the question whether unissued video poker licenses constitute property for purposes of 18 U.S.C. 1341, has not granted a writ of certiorari on the materiality issue.

750, 759 (6th Cir. 1999), petition for cert. pending, No. 99-1517; *Orsini* v. *Wallace*, 913 F.2d 474, 476 n.2 (8th Cir. 1990), cert. denied, 498 U.S. 1128 (1991). Maria Goodson is not excused from that waiver because *Neder* was decided after the oral argument in the court of appeals. At the time that she filed her initial brief on appeal, there was a square conflict in the circuits with respect to whether the materiality of a charged falsehood is an element of mail fraud or wire fraud. Compare, *e.g.*, *United States* v. *Slaughter*, 128 F.3d 623, 629 (8th Cir. 1997) (materiality is not an element), and *United States* v. *Cochran*, 109 F.3d 660, 667 n.3 (10th Cir. 1997) (same), with *United States* v. *Rodriguez*, 140 F.3d 163, 167 (2d Cir. 1998) (materiality is an element), and *United States* v. *DeSantis*, 134 F.3d 760, 764 (6th Cir. 1998) (same).

In any event, Maria Goodson's claim is without merit because the district court gave an adequate materiality instruction in connection with the mail fraud counts. The theory of the government's case was that Maria Goodson and her co-defendants submitted documents to the State that concealed the true owners of TSG, Ltd., and other information that could complicate the State's assessment of the suitability of TSG, Ltd., and its owners as a video poker licensee. The court instructed the jury that, in order to constitute a scheme to defraud, an omission must be "reasonably calculated to deceive persons of ordinary prudence and comprehension" and must "conceal[] a *material* fact." R. App. 4407 (emphasis added). The jury was thus instructed that it could find the defendants guilty of mail fraud only if the information concealed was material.

4. Maria Goodson contends (Pet. 22-28) that the court of appeals applied an unduly "deferential" standard in evaluating whether the evidence was sufficient

to support her conviction, because the court stated that "[t]he evidence need not exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, and the jury is free to choose among reasonable constructions of the evidence." Pet. App. 30a.

The same standard for reviewing the sufficiency of the evidence supporting a conviction has been invoked repeatedly by the courts of appeals. See, *e.g.*, *United States* v. *Ward*, 197 F.3d 1076, 1079 (11th Cir. 1999); *United States* v. *Rosso*, 179 F.3d 1102, 1106 (8th Cir. 1999); *United States* v. *Robinson*, 161 F.3d 463, 471 (7th Cir. 1998), cert. denied, 119 S. Ct. 1482 (1999); *United States* v. *Wynn*, 61 F.3d 921, 923 (D.C. Cir.), cert. denied, 516 U.S. 1015 (1995); *United States* v. *Seaton*, 45 F.3d 108, 110 (6th Cir.), cert. denied, 514 U.S. 1133 (1995); *United States* v. *Garcia*, 983 F.2d 1160, 1164 (1st Cir. 1993). Maria Goodson concedes (Pet. 27) that "all of the federal circuits and most state courts" apply such a standard.[3]

There is no reason to conclude that the court of appeals' application of that standard of review affected the outcome of the case. For example, although Maria Goodson contends (Pet. 22-23) that the standard caused the court to disregard certain evidence indicating that she was not legally required to report to state regulators her transfer of a 4.99% ownership interest in TSG, Ltd, to Benny Rayburn, she fails to identify any such

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[3] As Maria Goodson notes (Pet. 24-26 & n.19), a minority of States have, as a matter of state law, adopted a different standard, which provides that, when a conviction is based solely on circumstantial evidence, the circumstantial evidence must exclude every reasonable hypothesis of innocence. Because those cases are based on state law, they do not conflict with the decision below or the other federal decisions cited in the text.

evidence. The principal evidence that she cites for the proposition that ownership interests of less than 5% do not have to be reported, a letter from the State Police to owners of video gaming operations (Pet. App. 203a-205a), does not support a reasonable inference of innocence; rather, the letter states that persons with more than a 5% ownership interest in a video gaming operation must "meet all suitability requirements and qualifications for licensees" and that licensees must submit specified information on such persons. Other evidence, including the Affidavits of Full Disclosure that accompanied the license renewal applications (see *id.* at 92a-93a), established that ownership interests in *any* amount were required to be reported. The standard of review thus was irrelevant to the court's determination that Maria Goodson was required to report the transfer at issue.

5. Maria and Alexandros Goodson challenge (Pet. 28-30) the forfeiture of Fred Goodson's and Carl Cleveland's ownership interests in TSG, Ltd., and TSG, Inc. As petitioners note (*id.* at 30), a district court may invalidate an order of forfeiture under RICO if a third-party claimant proves, by a preponderance of the evidence, that he had a "legal right, title, or interest" in the forfeited property superior to that of the defendant at the time of the acts that gave rise to the forfeiture. 18 U.S.C. 1963(*l*)(6)(A). The district court correctly applied that standard in this case, concluding, after an evidentiary hearing, that petitioners failed to satisfy their burden of proving a "legal right, title, or interest" in the forfeited companies. Pet. App. 173a-174a. The court of appeals agreed. *Id.* at 42a-44a.

Petitioners contend (Pet. 28-29) that "a district court should be required to employ applicable state law principles when deciding the nature of an affected party's

property interest in criminally forfeited property." But neither the district court nor the court of appeals disagreed with that proposition. They simply declined to give effect to the "obviously false partnership agreement" that formed the basis for petitioners' claim of a "right, title, or interest" in the forfeited companies. Pet. App. 42a. As the court of appeals explained, "[t]he jury necessarily found that Fred Goodson and Carl Cleveland were the true owners of TSG, Ltd. and that [petitioners] were straw people used in the sham to hide the true ownership of TSG, Ltd." *Ibid.* Petitioners cite no Louisiana authority that would have compelled a conclusion that they were the true owners of the companies in the circumstances of this case, including the district court's findings that petitioners did not invest their own funds in the companies, did not manage the companies, and did not believe that they had any ownership interest in the companies at any relevant time. *Id.* at 171a-173a; see also *id.* at 42a-43a. In sum, the lower courts' fact-bound determination that petitioners had no valid "right, title, or interest" in the forfeited companies does not merit this Court's review.

CONCLUSION

As to the first question presented, the petition should be held pending the decision in *Cleveland* v. *United States*, No. 99-804, and disposed of in accordance with that decision. In all other respects, the petition should be denied.

Respectfully submitted.

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